Supreme Court, U.S.
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No. 09-518

IN THE

Supreme Court of the United States

ANDREW J. BULLOCK, IV,

Petitioner,

v.

ARTHUR S. KLEIN, ESQUIRE, ET AL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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Questions Presented

1. Has Petitioner presented compelling reasons for reversing the decisions of the District Court and the Third Circuit that there were no viable federal claims and declining to exercise jurisdiction of state claims?

2. Whether the Petitioner has properly preserved for appeal the issues raised before this Court?

3. Whether Petitioner's newly asserted Fifth Amendment claim is applicable to the Association Respondents?

List of Parties

All parties do not appear in the caption of this case on the cover page.

Petitioner:

Andrew J. Bullock, IV

Respondents[1]:

Arthur S. Klein, Esquire; Kenneth O. Sprang, Esquire; Scott Waterman, Esquire; Marie Rita Gleason Esquire; Thomas J. Crandall; Gerard Berger; Shayna Best; William Sunnick, Jr.; Donna M. Houghton; Ronald White; Christopher Conn; Sergeant Barrar; Officers John Doe (1-6); Captain Andrew Chambers; Hugh O'Hare; Thomas J. Foga, Jr.; Tredyffrin Township; Tredyffrin Township Police

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[1] This Brief is submitted on behalf of the following, collectively referred to as the "Association Respondents": Main Street Village Homeowners Association; Penco Management, Inc.; Monika Germono; Ronald A. White; Elizabeth Shingle (Bierly); Arthur S. Klein; Thomas J. Crandall; Gerard J. Berger; Shayna F. Best; William Sunick; Judith M. Wetzel; Donna Houghton; Patricia E. Evans; Kathryn Marinick; Edmund S. Pendleton, and Donald Franceschini.

Department; Main Street Village Homeowners' Association; Penco Management Inc.; Edmund S. Pendleton; Bryn Mawr Landscaping Company, Inc.; Atlantic Roofing Corp.; Jim Miller Roofing and Sheet Metal Inc.; James Miller; Wisler, Pearlstine, Talone, Craig, Garrity and Potash, LLP; Black Stranick and Waterman, LLP; Davis J. Scraggs, Esquire; Blair H. Granger, Esquire; Blair H. Granger and Associates, P.C.; Emeline Baldassarree; Judy DiFillipo; Warren Kampf; Bill Dehaven; Paul Drucker; Robert Lamina; Vincent Pompo, Esquire; Mark DeFeliciantonio; E. Brooks Keffer, Jr., Esquire; Elizabeth Shingle; Monika Germono; Thomas P. Hogan, Esquire; Sovereign Bank; Baci Brothers Builders, Inc.; Arjet Baci; Syrja Baci; Ilir Baci; Judith Wetzel; Patricia E. Evans; Kathryn Marinick; Don Franceschini.

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Third Circuit Court of Appeals:

Bullock v. Klein, et al., 2009 U.S. App. LEXIS 174143 (3d Cir. 2009).

Concise Statement of Jurisdiction

This Court has jurisdiction over the instant Petition for a Writ of Certiorari. The Petitioner alleged constitutional and federal statutory violations before the United States District Court for the Eastern District of Pennsylvania. 28 U.S.C. § 1331. The District Court dismissed the federal claims in Petitioner's Third Amended Complaint and declined to exercise jurisdiction over Petitioner's Pennsylvania state claims. Petitioner then appealed the District Court's Order to the Third Circuit Court of Appeals. 28 U.S.C. § 1291. The Third Circuit affirmed the judgment of the District Court on July 31, 2009.

The Petitioner filed the instant Petition for a Writ of Certiorari on October 29, 2009, the final day for filing his Petition. 28 U.S.C. § 2101.

Constitutional and Federal Statutory Provisions

1. United States Constitution, Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except

that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Concise Statement of the Case

Petitioner purchased 22 Sturbridge Lane, Wayne, PA on August 22, 1997. (Third Amended Complaint ¶ 1).[2] The residence is part of the Main Street Village planned community, which is managed by the Main Street Village Homeowners Association pursuant to a Declaration of Covenants and Easements. (Third Amended Complaint ¶ 1, 3). At some point after Petitioner purchased the property, the Association reconstructed a retaining wall on the common areas near his residence. (Third Amended Complaint ¶ 9). Petitioner alleged that the retaining wall was improperly constructed and caused water to flow into his basement during two rainstorms in October 1999. (Third Amended Complaint ¶ 11, 13).

Unhappy with the Association and its property manager's response to the situation, Petitioner stopped paying the assessments due to the Association. (Third Amended Complaint ¶ 16, 18). The Association initiated suit to collect the unpaid assessments in Pennsylvania District Court and Petitioner countersued. (Third Amended Complaint ¶ 19). Petitioner hired counsel and the claims between

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[2] The Association Respondents cite to the Third Amended Complaint instead of an Appendix as Petitioner did not number the pages of the attachments to his informal brief to the Third Circuit.

the Association and Petitioner were settled in May 2001, although Petitioner alleged that he never agreed to the settlement terms. (Third Amended Complaint ¶ 22, 23).

In January 2003, Petitioner requested the complete records of the Association for review and copying in order to ensure the proper operation of the Association. (Third Amended Complaint ¶ 36). The Association, through its counsel, declined his request because it was overbroad and because Petitioner was not a member of the Association in good standing due to unpaid assessments. (Third Amended Complaint ¶ 39).

In July 2003, the Board of Directors of the Association held a membership meeting concerning the replacement of the roofs in the community. (Third Amended Complaint ¶ 45). Homeowners who owed more than $1,000 in assessments were not permitted to cast a vote concerning the special assessment needed for the roof replacement. (Third Amended Complaint ¶ 45).

After the Association approved the assessment authorizing the replacement of all roofs in the community, the Association, through its Board President, requested that the Township issue building permits for the roof replacement work. (Third Amended Complaint ¶ 50-51). On November 7, 2003, Petitioner requested that the Township not issue a building permit for his residence. (Third Amended

Complaint ¶ 52). On the day his roof was being replaced, Petitioner contacted the Tredyffrin Township Police to try to prevent the roofers from accessing his property. (Third Amended Complaint ¶ 62-63). Despite Petitioner's protestations, the roof at 22 Sturbridge Lane was removed and replaced.

The factual allegations in Petitioner's Third Amended Complaint are confusing, excessive and non-sequential. What begins as a story concerning the many disputes between Petitioner and the Association dating back to 1999, the Third Amended Complaint degenerates into a confusing series of sometimes-unrelated paragraphs accusing a wide variety of individuals of conspiring against him possibly as part of a RICO scheme.

Although the Third Amended Complaint was confusing, it was clear that Petitioner was attempting to allege constitutional and federal statutory violations, so that he could invoke federal jurisdiction pursuant to 28 U.S.C. § 1331. The District Court spent considerable time reviewing the Third Amended Complaint in an attempt to determine all of the claims that Petitioner was attempting to allege. The District Court properly determined that even if accepted as true, the facts alleged by Petitioner did not state any federal claims for which relief could be granted. The Third Circuit also conducted a thorough plenary review of the allegations in the Third Amended Complaint and similarly determined that Petitioner did not state any federal causes of action against the

Association Respondents or any of the other numerous Defendants named in the Third Amended Complaint. In an unreported Opinion, the Third Circuit affirmed the District Court.

Argument

I. The Petitioner Has Not Presented a Compelling Reason for This Court to Review the Well-Reasoned Decision of the Third Circuit.

Petitioner claims that this Court should grant his Petition for a Writ of Certiorari because he believes that there is a "split between the recognized and protected property rights of homeowners in planned communities with regard to easements, as the FCC case, Tuthill, and this case seem to differ." (See, Petition for Writ of Certiorari, p. 9). The Association Respondents are not sure to what Petitioner is referring as neither Tuthill nor "the FCC case[3]" have anything to do with property rights in planned communities. The cases referred to by Petitioner concern the Fifth Amendment's "takings clause." Even the cases cited by Petitioner make it clear that the Association's roof replacement project was not a "taking" in the Constitutional sense.

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[3] Respondents believe that Petitioner is referring to *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

Supreme Court Rule 10 states that the Court will only grant a writ of certiorari for compelling reasons. The Court will consider granting a petition requesting a writ of certiorari if "a United States Court of appeals has entered a decision in conflict with another United States court of appeals on the same important matter." Supreme Court Rule 10(a). Despite Petitioner's allegations, the Third Circuit has not entered a decision in conflict with any other federal appellate court case.

The Third Circuit's decision to affirm the District Court's dismissal of Petitioner's Fifth Amendment claims is consistent with the Federal Circuit's decision in *Tuthill Ranch* and this Court's decision in *Loretto*. Both *Tuthill Ranch v. United States*, 381 F.3d 1132 (Fed. Cir. 2004) and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) hold that a permanent physical occupation of property by the government or by a third party acting under government authority is required in order to find a taking. "A physical occupation, as defined by the Court, is a permanent and exclusive occupation that destroys the owner's right to possession, use and disposal of the property." *Tuthill Ranch v. United States*, supra., citing *Boise Cascade Corp v. United States*, 296 F.3d 1339, 1353 (Fed. Cir. 2002).

In this case, the removal and replacement of Petitioner's roof by the Association could never constitute a permanent physical occupation of Petitioner's property by the government. Petitioner was a resi-

dent of a planned community and subject to a Declaration of Covenants and Easements. The declaration gave the Association to right to replace the roofs in the community[4]. Despite Petitioner's objections, the roof was removed and replaced at the direction of the Association. The replacement of the roof was within the rights granted to the Association in the Declaration of Covenants and Easements that Petitioner agreed to when he purchased his home within the community. The removal and replacement of the roof was not a permanent physical occupation. During and after the roof replacement, Petitioner had the ability to possess, use and dispose of his property.

There is no split between recognized property rights set forth in previous case law and the District Court and Third Circuit decisions in this case. Petitioner was not subject to a permanent physical taking of his property by the government no matter how upset he was with the Association's decision to replace the roof over his Unit. There is no compelling reason for the Court to grant the Petition and consider the merits of this case.

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[4] The Declaration of Covenants and Easements states, in pertinent part, "the Association shall provide upon any lot requiring same, when necessary in the opinion of the Board of Directors of the Association to preserve the beauty, quality and value of the neighborhood . . .roof repair and replacement. . .." (Cited by the Third Circuit as Supplemental Appendix 83).

Petitioner has not presented any reason why this Court should overturn the District Court and the Third Circuit's decision that the Petitioner failed to state a federal claim against any of the numerous Respondents. The District Court allowed the Petitioner to Amend his Complaint three times in order to allow the Petitioner the opportunity to state a viable federal claim. After several attempts, it was clear that Petitioner's claims against the Association and many other Respondents failed to state a federal cause of action. There is nothing compelling or even unique about the claims raised by Petitioner and there is no reason for this Court to review the Third Circuit's well-reasoned ruling.

II. Petitioner's did not raise the claims outlined in his Petition for Writ of Certiorari in the Courts below.

Petitioner's Third Amended Complaint, which was dismissed by the District Court, is a rambling document alleging a variety of state and federal claims. His Third Amended Complaint contained two hundred and six numbered paragraphs and eight counts but failed to state which claims he was raising against which of the numerous defendants named in the caption of his Complaint. The District Court carefully reviewed the Third Amended Complaint and located nine federal claims raised by Petitioner. Those claims were: 1) Fair Debt Collection Practices Act; 2) 42 U.S.C. § 1983, Taking Clause; 3) 42 U.S.C. § 1983, Equal Protection; 4) Racketeer Influenced

and Corrupt Organizations Act (civil); 5) Fair Housing Act; 6) Telecommunications Act; 7) Mail Fraud Act; 8) Wire Fraud Act; and 9) Racketeer Influenced and Corrupt Organizations Act (criminal). See, *Bullock v. Klein, et al.*, 07-cv-0621 (E.D. Pa. October 21, 2008). It appears that Petitioner is only seeking review of his Fifth Amendment Taking clause claim made applicable to state actors through 42 U.S.C. § 1983. However, Petitioner makes new allegations of fraud and claims that the Association exceeded its authority to replace his roof in his Petition.

Petitioner begins his "Statement of the Case" with allegations that the Association has perpetrated some type of fraud against him for failing to provide discovery to Petitioner during the *state court* litigation. (See, Petition for Writ of Certiorari, p. 3). Association Respondents are unsure what these allegations concern as they were not a part of the Third Amended Complaint and never before raised in this litigation.

Petitioner and the Association were involved in two separate state court cases during the time that Petitioner resided at 22 Sturbridge Lane. The first suit concerned water intrusion into Petitioner's basement that may have been caused by an improperly constructed retaining wall. In that litigation, Petitioner was represented by counsel and the matter was settled out of court. Thereafter, the Association instituted collection proceedings against Petitioner for his failure to pay the assessments due

to the Association. There are no allegations in the Third Amended Complaint that Petitioner sought discovery during the collection case that was denied to him.

In his Third Amended Complaint, Petitioner did allege that he sought records from the Association to ensure the proper administration of the Association. (Third Amended Complaint ¶ 36). Petitioner never alleged that the Association's failure to provide its records had anything to do with the state court litigation, or which state court litigation. In addition, if Petitioner had been denied discovery in his state court cases, his recourse would be to the state courts. Association Respondents can think of no federal cause of action that would accrue for an alleged failure to provide discovery in a state court case.

More importantly, Petitioner never raised this claim in his Third Amended Complaint. The District Court or the Third Circuit never considered this claim in the Third Amended Complaint and never ruled on the issue. This claim has been waived by the Petitioner and should not be considered by this Honorable Court. *K-2 Ski Co. v. Head Ski Co., inc.* 506 F.2d 471 (9th Cir. 1974).

In the Questions Presented portion of the Petition, it appears that the Petitioner is asking this Court to decide whether the Association's decision to replace the roofs in the Community exceeded its authority under the Declaration of Covenants and Easements.

Petitioner never raised this claim in his Third Amended Complaint or in his appeal to the Third Circuit. Indeed, the District Court stated, in a footnote, that Petitioner "does not assert any claim related to the roof replacement itself." (Opinion, 10/21/08, footnote 13).

The Third Circuit made its own determination that the Association had the authority to replace the roof in its plenary review of the District Court's dismissal of the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). However, that determination was made as part of the Fifth Amendment "takings" claim made against the Township defendants pursuant to 42 U.S.C. § 1983. Petitioner never based a federal claim in his Third Amended Complaint against the Association on an allegation that the Association exceeded it authority under the Declaration of Covenants and Easements to replace the roof, nor could he. There is no federal law or Constitutional authority for a federal court to involve itself in such a decision. If Petitioner believed his Association was acting outside of the authority granted to it in the Declaration of Covenants and Easements, Petitioner could have filed a claim in state court. He could have requested an injunction to prevent the roof replacement while the Court determined the limits of the Association's authority. This Court should decline to entertain new theories of recovery not alleged in the Third Amended Complaint and not decided by the Lower Courts.

III. Fifth Amendment Claim Not Applicable to the Association Respondents

Should this Court believe that Petitioner adequately alleged a Fifth Amendment Taking Clause claim against the Association Respondents in his Third Amended Complaint, this Court should deny review of this claim. The Association and its Executive Board are private actors. Their actions in determining that the roofs needed to be replaced and undertaking all necessary actions to have to roofs replaces does not implicate a Constitutional taking.

Federal Constitutional violations have no internal enforcement mechanisms. Individuals are permitted to bring claims concerning violations of the Fourteenth Amendment and other amendments because of 42 U.S.C. § 1983. Section 1983 is not itself source of substantive rights, but merely provides method for vindicating federal rights elsewhere conferred. Albright v. Oliver, 510 U.S. 266 (1994). The language of 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution

> and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

To make out a claim under §1983, a plaintiff must demonstrate that the conduct of which he is complaining has been committed under color of state or territorial law and that it operated to deny him a right or rights secured by the Constitution and laws of the United States; the plaintiff must also establish that it was the acts of the defendant which caused the constitutional deprivation. *Mosley v. Yaletsko*, 275 F.Supp.2d 608 (E.D.Pa. 2003). State action for purposes of a §1983 claim may be found if a private party has acted with help of or in concert with state officials, if a private party has been delegated power traditionally exclusively reserved to state, or if there is sufficiently close nexus between the state and the challenged action of a private entity so that the action of latter may fairly be treated as that of the state itself. *McKeesport Hosp. v. Accreditation Coun-*

cil for Graduate Medical Educ., 24 F.3d 519 (3d Cir. 1994).

Main Street Village is a planned community in Chester County, Pennsylvania that is governed by the Pennsylvania Uniform Planned Community Act (68 Pa.C.S. §§ 5101-5414) and a recorded Declaration of Covenants and Easements. Main Street Village consists of individually-owned town homes and common areas owned by the Association for the benefit of the homeowners. The Board is comprised of homeowners who voluntarily administer the affairs of the Association. There is no allegation or implication that the Association or its Board members are state actors or that their actions can somehow be construed as state action. The District Court properly dismissed Bullock's equal protection claim for failure to allege any state action as required by 42 U.S.C. § 1983. The same reasoning must apply to any new claim raised before this Court that the Association Respondents somehow violated Petitioner's Fifth Amendment rights.

Finally, it should also be noted that Petitioner's Fifth Amendment claim is time-barred. Civil rights claims under §1983 are subject to Pennsylvania's two-year statute of limitations for personal injury claims. Hall v. City of Philadelphia, 828 F.Supp. 365 (E.D.Pa. 1993). Petitioner initially filed this federal action on February 15, 2007, more than two years after the roof was replaced in July, 2004.

This Court should decline to review Petitioner's claims under the Fifth Amendment Takings clause as against the Association. Petitioner never before raised this claim against the Association Respondents. Further, the Petitioner cannot establish a Constitutional violation against the Association Respondents as they are not state actors. Finally, Petitioner's Fifth Amendment claim is time-barred.

Conclusion

For all the reasons set forth above, the Association Respondents respectfully request that this Honorable Court deny Petitioner's Writ of Certiorari.

Respectfully submitted,

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Hal. A. Barrow
Counsel for Association
Respondents